

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MINNESOTA

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5 In re:) Civil 05-MD-1708 (DWF/AJB)
6)
7 GUIDANT CORPORATION) STATUS CONFERENCE
8 IMPLANTABLE DEFIBRILLATOR)
9 PRODUCTS LIABILITY)
10 LITIGATION,)
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14 This Document Relates)
15 To All Actions) 9:30 o'clock, a.m.
16) June 21, 2006
17) Minneapolis, Minnesota
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21 BEFORE THE HONORABLE JUDGE DONOVAN W. FRANK AND
22
23 THE HONORABLE MAGISTRATE JUDGE ARTHUR J. BOYLAN
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25 UNITED STATES DISTRICT COURT JUDGE AND MAGISTRATE JUDGE
CIVIL STATUS CONFERENCE PROCEEDINGS

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1 (In open court.)

2 THE HONORABLE JUDGE FRANK: Thank you. You
3 may all be seated.

4 We welcome you again to beautiful Downtown
5 Minneapolis, or whatever other description you may
6 choose to attribute to it.

7 Why don't I first have Plaintiffs and
8 Defendants, respectively, note their presence today, and
9 then we will proceed?

10 MR. ZIMMERMAN: Good morning, Your Honor, I
11 am Charles Zimmerman appearing on behalf of the
12 Plaintiffs Steering Committee.

13 MR. LESSER: Good morning, Your Honor, Seth
14 Lesser on behalf of the Plaintiffs.

15 MR. HOPPER: Good morning, Your Honor, Randy
16 Hopper on behalf of the Plaintiffs.

17 MS. FLEISHMAN: Wendy Fleishman on behalf of
18 the Plaintiffs.

19 MS. STRIKIS: Cindy Strikis, on behalf of the
20 Plaintiffs.

21 MR. BECNEL: Daniel Becnel. I think we
22 termed your city, the Paris of the North.

23 MR. SALAS: Good morning, Your Honor, Camilo
24 Salas on behalf of the Plaintiffs.

25 MS. PEARSON: Good morning, Your Honor, Gale

1 Pearson on behalf of the State Court Plaintiffs.

2 MS. TORISEVA: Good morning, Teresa Toriseva
3 on behalf of the Plaintiffs.

4 MS. BARNES: Lauren Barnes on behalf of the
5 Plaintiffs.

6 THE HONORABLE JUDGE FRANK: Anybody else care
7 to introduce themselves? I don't know if we are divided
8 or demarcated by parties. All right?

9 MR. DRAKULICH: Nicholas Drakulich on behalf
10 of the Plaintiffs, Your Honor.

11 MR. SHELMAN: Hunter Shelman (PH) on behalf
12 of the Plaintiffs.

13 MR. GOLDSER: I guess you will meet us all,
14 Your Honor, Ron Goldser on behalf of the Plaintiffs.

15 THE HONORABLE JUDGE FRANK: Fair enough.

16 MR. OVERHOLTZ: Neil Overholtz on behalf of
17 the Plaintiffs.

18 MR. RICHARDS: Keith Richards on behalf of
19 the Plaintiffs.

20 MR. HOPPER: This is our paralegal, Your
21 Honor.

22 THE HONORABLE JUDGE FRANK: Mr. Pratt, do you
23 want to begin with the Defense?

24 MR. PRATT: Tim Pratt for Guidant.

25 MS. MOELLER: Debbie Moeller for the

1 Defendant.

2 MR. CARPENTER: Andrew Carpenter for the
3 Defendants.

4 MR. PRICE: Joe Price for Defendants, Your
5 Honor. Mr. Becnel has never been to St. Paul, which is
6 really the Paris of the North.

7 MR. BECNEL: Oh, I have. And I have to go
8 there on Viagra in about two hours.

9 MR. ZIMMERMAN: Well, that is a personal
10 problem.

11 (Laughter.)

12 MR. ZIMMERMAN: We like to sprinkle humor
13 into the courtroom, Your Honor.

14 THE HONORABLE JUDGE FRANK: I will note for
15 the record that, for everyone in the courtroom,
16 consistent with the prior meetings of counsel for each
17 Plaintiff and Defendant, we did meet as scheduled from
18 8:00 until 9:15 this morning.

19 And there is a joint agenda that was posted
20 on our court website. But, we will go through those
21 item by item. Maybe, without trying to get off the
22 agenda, I will just note there has been requests, as the
23 lawyers for the respective parties know, we get requests
24 from time to time to appear by telephone from individual
25 Plaintiffs. And the policy of the Court has been and

1 will continue to be that, generally, what we tell to
2 individual Plaintiffs' counsel from around the country,
3 the requests that came in this week happened to be for a
4 case new to the MDL, that they should contact first of
5 all plaintiffs' Counsel Committee. And then if there
6 is -- whether there is agreement or not, if there is a
7 compelling reason why something has to be brought to the
8 Court's attention in the interests of fairness to a
9 party or to minimize hardship, we will take it up on a
10 case-by-case basis, but will not be, for a variety of
11 reasons, many of which I will articulate, if asked to,
12 the having this an open phone line, realizing that some
13 judges, both MDL and non-MDL, do that. In part, because
14 we roll the transcript out on to the website. But, we
15 will take them up on a case-by-case basis and that is a
16 general guideline. And there may be a compelling
17 circumstance, because we have the technology, that is
18 not the issue. It is more in the interests of fairness,
19 decorum, control, and a good record.

20 And if from my point of view or our point of
21 view, if we step off the curb, unless there is a
22 compelling case, and there may well be from time to time
23 where fairness dictates somebody be heard for the record
24 without having somebody come in here for a minute or two
25 presentation, we must be prepared to do it for large

1 numbers of people. Until there is some compelling
2 reason that sends us that way, that is kind of the
3 approach we have been taking when we get the individual
4 requests.

5 And I say it in part today, and I think many
6 here knew that, but now for others new to the case, as
7 the transcript rolls up on the website, they can see
8 that we will direct people initially to the committee,
9 and then we will go from there.

10 With that interruption, we can leave at the
11 end the scheduling issues for the phone conference and
12 the next status conference. But, we might as well
13 begin, Mr. Zimmerman, if you wish?

14 MR. ZIMMERMAN: Thank you.

15 THE HONORABLE JUDGE FRANK: Did you have
16 anything else?

17 THE HONORABLE MAGISTRATE JUDGE BOYLAN: No.

18 MR. ZIMMERMAN: The first item on the agenda,
19 Your Honor, is the number and status of cases
20 transferred into the MDL Court. And I guess embedded in
21 that is also the question of cases that are outside in
22 State Courts, and the coordination that has occurred in
23 Minnesota.

24 Recently, I have learned that an Order was
25 signed by the Chief Judge of the Minnesota Supreme Court

1 to coordinate all of the state cases in Minnesota before
2 Judge Leary in Ramsey County. That was not on the
3 agenda as a particular item, but we learned that
4 recently and I just wanted to inform the Court and
5 counsel here that the State Court proceedings have now
6 all been coordinated and consolidated before one judge
7 in Ramsey County.

8 THE HONORABLE JUDGE FRANK: And if I may, I
9 have not talked to Judge Leary since that Order, but the
10 Judge that I have communicated with the most, me with
11 him and he has initiated contact with me, is in fact
12 Judge Leary from Ramsey County.

13 And so, I am just going to indicate for the
14 record while he has got his job to do and we have got
15 our job to do, every indication that I have is that we
16 probably agree on the value of coordination and trying
17 to move forward without compromising the interests of
18 his cases or ours. And so, it should mean for all
19 parties in this case, that should be good news, in my
20 judgment, based on my contacts with the Judge.

21 MR. ZIMMERMAN: And I know Gale Pearson is
22 here, who has been representing, or speaking on behalf
23 of the State Court cases. I don't know if you have any
24 status on the numbers or anything you wanted to say
25 about the cases that have been consolidated, but you

1 certainly can come forward.

2 MS. PEARSON: No, I think we are doing fine.
3 Thank you. Excuse me, if the Court has any questions, I
4 can answer them specifically. Otherwise --

5 THE HONORABLE JUDGE FRANK: Judge Boylan and
6 I just said to Judge Leary and he said the same thing to
7 us -- and I don't think it is really remarkable,
8 particularly, it is quite consistent with cases across
9 the country. That if there comes a time, sooner or
10 later, where there is some value in us getting together,
11 the three of us, for whatever reason, with counsel or
12 some joint session, there may or may not come such a
13 time, such things have occurred in other cases. We have
14 just expressed our willingness to do that and he has
15 done the same. That may or may not become necessary.

16 And obviously, we will both disclose to
17 counsel in both sets of cases any contact that we have.
18 So, I think as long as the communication lines are open,
19 that can only benefit all of the parties. So --

20 MR. ZIMMERMAN: And we understand, as the
21 Plaintiff's Steering Committee, the importance of State
22 and Federal coordination. Dawn Barrios from Louisiana
23 is doing the State and Federal coordination efforts, as
24 well in other states, as Gale Pearson is doing in
25 Minnesota. And we recognize the value of it.

1 We will see where it goes. As problems or
2 issues develop, we will deal with them. We don't know
3 of any at this particular period of time. But, we
4 appreciate the openness with which the Court is dealing
5 with that issue because it is often a tricky wick in
6 complicated proceedings where there are cases in both
7 State and Federal Court.

8 And the question of transferred cases into
9 the MDL and number and status of the cases, I think Mr.
10 Pratt has better information than I, but the most recent
11 information I have may not be the most relevant -- or, I
12 mean, the most recent, so we will let Tim go forward on
13 that issue.

14 MR. PRATT: Yeah, we have actually have a
15 number of new case filings very recently in Federal
16 Court. The total number of cases we now have in Federal
17 Courts are 437. And they fall into three different
18 buckets, as they always do. How many are here,
19 presently? You have 333 lodged in the MDL at the
20 current time. You have 48 of them that are pending
21 before the Panel under official tag-along sort of
22 conditional transfer orders and then the rest of them
23 are recently enough filed that they are yet to be tagged
24 along in front of the Judicial Panel.

25 So, the total of 437 in Federal Court, 333

1 here, for all purposes, consistent with the MDL orders.
2 We have 46 State Court cases, which means that the new
3 case filings have predominantly been directly into
4 Federal Court.

5 I believe, and Gale may have more recent
6 information than I, that we have about a dozen state
7 court cases in Minnesota that have been consolidated
8 before Judge Leary. So, we will be moving ahead on
9 that, those consolidated cases. This is the only state
10 where there has been consolidation. Actually, I think
11 the highest number of cases pending in any other state
12 is five or six in Texas, so they are pretty widely
13 disbursed around the country. So, that is, I think, the
14 current layout of the number and types of cases.

15 THE HONORABLE JUDGE FRANK: Thank you. If I
16 may, something that came up at the conference this
17 morning that I raised and you can have a seat if you
18 like, Mr. Pratt.

19 MR. PRATT: Fine.

20 THE HONORABLE JUDGE FRANK: We have a
21 doctrine in most districts, the related case doctrine.
22 It is an administrative doctrine, not a legal doctrine,
23 of the case that come in, and then between the lawyers
24 and ultimately the judge or judges, they decide if cases
25 are related, which I say is an administrative doctrine

1 for case management, to decide, well, is there prudence
2 in one judge managing the cases? It is a bit different,
3 of course, when it is an MDL.

4 Recently, and I only bring it up because it
5 probably will come up in the future and we will deal
6 with them on an individual basis. A case came in, and
7 it was out of the device Ventak Prizm VR Model 1850.
8 And it was individually assigned to another judge. And
9 I wasn't the Judge who randomly drew the case. And the
10 decision has been made by Judge Doty and myself that it
11 is a related case. And the lawyer has been so informed.
12 And one of the Plaintiffs' Counsel today indicated that
13 he had talked with him. But, as these come in, that may
14 be an issue. But, the related case doctrine, sometimes
15 lawyers from afar looking at it, it is an administrative
16 rule of case management, principle of most districts of
17 just way they manage the cases. But, as they come in we
18 will look at that. We deem this one part of the MDL
19 case. But, any correspondence that we individually have
20 with any individual lawyers that take the position --
21 because we have been asked to reconsider that decision,
22 we agreed this morning that we will copy in counsel on
23 both sides so that everyone is kept aware that there are
24 certain individuals who have filed a Federal Court
25 action but suggested that they are unrelated because of

1 a particular device. We have concluded otherwise. But,
2 we will keep everybody informed. We can move on.

3 MR. ZIMMERMAN: Thank you. I just want to
4 state for the record that the short form check-off
5 complaint has been approved by the Court. I believe it
6 is available now. So people who have been not filing or
7 waiting the simplified filing through the short form
8 process, it is up, running and available and that may or
9 may not, probably impact these numbers going forward.

10 The next issue, Your Honors, is the discovery
11 status. It breaks down into status of depositions and
12 deposition concerns. Normally Richard Arsenault makes
13 this report. He was not able to make it here because of
14 some flight complications out of Louisiana. But, I
15 think it is fair to say that the depositions are moving
16 rapidly and approximately 19 have been completed, I
17 believe is the number.

18 MS. MOELLER: Noticed.

19 MR. ZIMMERMAN: I'm sorry, noticed. There
20 are probably five or six that we have discussed with the
21 Court this morning. We are awaiting direction from the
22 Court on whether those five or six additional ones will
23 be available.

24 And these are all going to be completed
25 before any preemption motion is responded to by the PSC.

1 A motion for preemption has been filed by the Defense.
2 And as we spoke with the Court this morning, we are
3 going to complete the discovery, and then two weeks
4 after the completion of the discovery, the PSC will file
5 their reply or response.

6 THE HONORABLE JUDGE FRANK: And actually,
7 Judge Boylan will give you the ruling, but one reason
8 for us late coming in here, we had a chance to discuss
9 it. And we will make a ruling today on that issue.

10 MR. ZIMMERMAN: Okay.

11 THE HONORABLE MAGISTRATE JUDGE BOYLAN: We
12 might as well make the ruling right now. The
13 depositions, all five, will be completed, including
14 Arrowsmith-Lowe and DeVries. The depositions should be
15 completed on or before August 15th.

16 Presuming that those depositions are
17 completed by August 15, as ordered, the Plaintiffs'
18 response on the Defense motion relative to preemption
19 issues will be served and filed on or before September
20 1st. The Defendant's reply will be due on or before
21 September 15th.

22 Counsel should contact Judge Frank's chambers
23 probably immediately, for that matter, to obtain a date
24 for a hearing on the preemption issue and the place
25 where that may take place. It may take place, I guess

1 it is up to you, Judge, whether it is in St. Paul or
2 here in Minneapolis, but counsel are directed to contact
3 his chambers.

4 In reference to the expert depositions, I'm
5 assuming there is going to be a meet and confer in
6 reference to appropriate protocol. And absent some
7 disagreement, the parties will stipulate and be able to
8 agree on such a protocol.

9 THE HONORABLE JUDGE FRANK: And then I would
10 like you all to get back to us. It doesn't need to be
11 today, on knowing what this is. If it is the sense of
12 the group to set the oral argument for the motion on the
13 same day that coincides to when we're together, so that
14 other people can observe, fine.

15 If it is the sense of the group that that
16 should be done some other time for whatever reasons, I
17 will try to accommodate that. And I will just indicate
18 something that many of the lawyers in the room already
19 know. This whole schedule, really apart from some of
20 the nuances of the ruling here is not holding up or
21 delaying anything.

22 So, if anybody is saying, is this having any
23 effect on the existing deadlines and the schedule, it is
24 not. It was all anticipated and it is all set up. It
25 may not be going exactly as individuals wanted, but it

1 is going along, I think, essentially as planned. So --

2 MR. ZIMMERMAN: Just so I could make sure I
3 understand and the record is clear if anybody is going
4 to read the transcript, that the completion of the
5 discovery that the Court has just ordered of, I think,
6 an additional five depositions --

7 THE HONORABLE MAGISTRATE JUDGE BOYLAN: There
8 were five depositions, but as I understood it, three of
9 those were uncontested --

10 MR. ZIMMERMAN: Correct.

11 THE HONORABLE MAGISTRATE JUDGE BOYLAN: Two
12 were contested. I am presuming all five will be
13 completed by August 15, including the two that were
14 contested, which is DeVries and Loel.

15 MR. ZIMMERMAN: I stand corrected, that is
16 absolutely how I understood it. It may not have come
17 out that way, but that is how I understood it.

18 And then the brief of the Plaintiffs Steering
19 Committee on the issue of preemption will be due
20 September 1.

21 THE HONORABLE MAGISTRATE JUDGE BOYLAN:
22 Correct.

23 MR. ZIMMERMAN: The reply brief will be due
24 from the Defense on September 15th.

25 THE HONORABLE MAGISTRATE JUDGE BOYLAN:

1 Correct.

2 MR. ZIMMERMAN: And both of us are asked to
3 contact Mr. Lowell Lundquist -- is it Lundquist?

4 THE HONORABLE JUDGE FRANK: Lindquist, as in
5 Leonard Lindquist.

6 MR. ZIMMERMAN: Leonard Lindquist. I
7 remember Leonard very well, Leonard and Lowell. And
8 then --

9 THE HONORABLE JUDGE FRANK: Lowell, you
10 haven't been in C.J.'s column, so --

11 MR. ZIMMERMAN: You might if you keep this
12 up.

13 THE CLERK: Thank you, Judge.

14 MR. ZIMMERMAN: We will contact the chambers
15 to have a hearing date. Is there any direction from the
16 Court as to how long after September 15th you --

17 THE HONORABLE MAGISTRATE JUDGE BOYLAN: I
18 think you should contact the chambers immediately, given
19 the fact that you know what the briefing schedule is,
20 there is no reason you can't obtain a date for a
21 hearing.

22 THE HONORABLE JUDGE FRANK: We will give you
23 a day.

24 THE HONORABLE MAGISTRATE JUDGE BOYLAN: I am
25 sure the Judge will want to have several weeks between

1 the completion of the briefing and the hearing to review
2 the briefs. But, I think on or after October 1st --

3 THE HONORABLE JUDGE FRANK: Yeah, the issue
4 will really be, as I mentioned a moment ago, if the
5 sense of the group is for whatever reasons you would
6 like to coordinate it with when we are here together, we
7 will make that work. If the sense of the group is -- we
8 have done that in one other case. We started late in
9 the morning on the prior set of motions I heard.

10 If the sense of the group is, for whatever
11 reasons, well, we want to do it on a different date, I
12 will accommodate either. And we can give you a date as
13 soon as today, if you want it.

14 MR. ZIMMERMAN: Yeah, we might as well get it
15 by the time we leave today, and then everyone will know.
16 I think it is the kind of hearing people may want to
17 come in for. I think it is probably not, in my
18 judgment, a special hearing, but --

19 THE HONORABLE JUDGE FRANK: We can talk about
20 that as long as -- you folks can meet and confer and
21 then we will come up with a --

22 MR. ZIMMERMAN: We will talk about that.

23 The status of the production of documents and
24 the 18 --

25 MR. PRATT: Excuse me. If we could spend

1 just a second on the status of depositions, Ms. Moeller
2 has got some -- I thought it would be helpful to give the
3 Court a sense of where we are and what we are doing in
4 terms of the individual depositions.

5 THE HONORABLE JUDGE FRANK: Fair enough.

6 MS. MOELLER: Since the last status
7 conference, we completed or begun the depositions of Dan
8 Tich, manager of reliability and quality assurance,
9 Scott Olson, who is a 30(b)6 marketing witness, Allan
10 Gorsett, former vice-president of quality assurance and
11 reliability, completed the 30(b)6 deposition of Randy
12 Nuernberg, who was on the topic of medical advisories
13 and recalls, and completed the 30(b)6 deposition on
14 Chris Harrold on the subject limited to 1861's, by the
15 prior stipulation with the Court. And also to Todd
16 Koning, the 30(b)6 on warranties.

17 We have scheduled within the upcoming months
18 several more depositions and are working on others. We
19 have been in discussions with the Plaintiffs' counsel
20 about the duplicative nature of some of their requests,
21 and so they have agreed to pull some notices down
22 pending notice depositions to see if we can come to some
23 agreement on those issue without coming back here.

24 We are running into issues with -- and I
25 think Mr. Carpenter will be addressing this more on the

1 subject of documents. We have had some depositions that
2 have been scheduled that have had to be pulled down
3 because of questions about the completeness of discovery
4 that has been submitted, which is putting some things
5 off. And I believe that they have now noticed from our
6 perspective all of the 29 company reps and third parties
7 that they are entitled to under the current deposition
8 protocol and completed all of the five 30(b)6 witness
9 depositions, with the exception of the continuation of
10 Mr. Harrold's deposition that we are also allowed under
11 the deposition protocol.

12 MR. ZIMMERMAN: Our only response is we are
13 certainly trying to work these out. We don't want any
14 duplicative depositions. We are not interested in that.
15 We are interested in the facts and what happened. And
16 we will work it out.

17 The status of production of documents on 1861
18 and other devices, what we have requested from the
19 Defense is that we have a certification that that
20 production is complete. I think that is sort of where
21 we were in chambers. And we are just waiting for the
22 Defense to provide us with this notion that -- the
23 notice that that discovery has been tendered and is
24 complete. The idea there is we don't want to have
25 documents coming in at the tail end, or documents

1 filtering in later that says, oh, we forgot, these
2 should have been produced. And we are working with them
3 on that and I think that will be forthcoming.

4 We just tickle that as an issue. If it
5 doesn't happen, we will bring that before the Court.
6 But, we expect it will happen and it won't be an issue
7 at all.

8 I don't know if there is anything else on
9 documents, but Defense may have something.

10 MR. PRATT: I do want to say -- you know, Mr.
11 Carpenter is going to address this. We have been
12 working, I think, very well with the Plaintiffs Steering
13 Committee. I mean, I have been involved in these
14 things, and I think that we have reached agreements on
15 lots of things. And I think Your Honors could attest to
16 the fact that this MDL is going fairly smoothly without
17 too much judicial involvement. And part of it is I
18 remember a telephone conference with Judge Boylan when
19 he barked at us for, you know, you've got to get along
20 and stop taking these petty squabbles to the Court's
21 attention. So, I think we took that to heart, and I
22 think we have actually worked out most of these
23 agreements.

24 THE HONORABLE MAGISTRATE JUDGE BOYLAN: I
25 think you are misquoting me.

1 MR. PRATT: I don't know if the word petty
2 was used.

3 THE HONORABLE MAGISTRATE JUDGE BOYLAN: I
4 think it qualified as a bark.

5 MR. PRATT: And we are all working it out.
6 We are reaching the point where we got lots of
7 depositions noticed, we are trying to get them ready.
8 They want documents and they are entitled to documents.
9 We are trying to get them to them. I think that dialog,
10 the weekly conference calls have been working well in
11 that regard. But, Mr. Carpenter, if you could address
12 maybe the item 2B, please?

13 MR. CARPENTER: Just briefly, Your Honors, to
14 amplify what Mr. Zimmerman and Mr. Pratt said. We think
15 that document production is going efficiently and well.
16 To date we have produced over 6.4 million pages of
17 documents in this litigation.

18 Next week we are scheduled to produce another
19 approximately two million more pages of documents, but
20 it's close to eight and a half million pages so far,
21 which in comparison to most other MDL's is an extremely
22 fast pace.

23 We are also working with the Plaintiffs
24 Steering Committee to make sure that we are trying to
25 focus on the issues, and producing the documents that

1 are most useful in the priorities that Plaintiffs want
2 us to do them. We meet at least once a week, sometimes
3 twice a week to discuss these ongoing issues.

4 Right now we are primarily focusing on
5 identifying and making sure we produce all of the
6 documents that are relevant to the particular company
7 witnesses that the Plaintiffs have noticed for
8 deposition.

9 We are also focusing on expediting any
10 relevant documents agreed to produce pursuant to the
11 Defendant's fact sheet that apply to specific bellwether
12 Plaintiffs, so we have those as quickly as possible.

13 We will work and continue to work with the
14 Plaintiffs Steering Committee on making sure to produce
15 all of the documents for these witnesses that we can
16 reasonably be sure of.

17 It is a massive undertaking. We go through
18 enormous efforts to make sure we've got all of the
19 documents. There is always the chance that a few -- we
20 uncover certain dates, and we always have technical
21 issues with certain problem documents that are hard to
22 recognize, require reprocessing and reprocessing and
23 reprocessing. These technical challenges are things
24 that we are dealing with on an ongoing basis. But, we
25 will work, and we should be in a position that we can

1 certify to a reasonable certainty to all reasonable
2 measures that we think we have got all of the relevant
3 documents for these witnesses.

4 THE HONORABLE JUDGE FRANK: Thank you.

5 MR. ZIMMERMAN: Privilege and redaction
6 issues. It says we have a motion pending, two motions
7 pending. I believe that we agreed that those were going
8 to be heard at the next status, is that correct?
9 Defendants want to brief it, and I don't understand why,
10 but they do.

11 THE HONORABLE JUDGE FRANK: And I think again
12 for the rest of the folks in the room, I think it was
13 the consensus of the group that that is not going to --
14 nothing has been put on hold. I mean, because,
15 obviously, if there was a strong view from either side
16 of the aisle that, well, if the Court would agree to
17 hear it sooner than the next conference which we will
18 set before we are done here, we would do that. But, I
19 think we have an agreement that it is not going to slow
20 anything else down. We will get to it and make a ruling
21 on it. All right?

22 MR. ZIMMERMAN: Very good. Then the last
23 issue under discovery, Your Honor, is the bellwether
24 Plaintiff fact sheet issues. I guess that is really a
25 Defense issue. It is a massive undertaking and we know

1 there are technical challenges, but we will do our best.
2 Those were your words, Andy.

3 MR. PRATT: Yeah, Mr. Carpenter, I think, is
4 more involved in that massive undertaking, eight and a
5 half million pages. We know massive, but we are -- we
6 are moving ahead with depositions of individual
7 bellwether Plaintiffs. We have started that process.
8 They are scheduled, but we do have, you know, it sounds
9 like a refrain, but some issues over the adequacy even
10 of the bellwether Plaintiffs of the fact sheets and the
11 authorizations, so -- Mr. Carpenter, you can address
12 that.

13 MR. CARPENTER: Sure. And as the Court
14 knows, this is an issue we have touched on before. On
15 the one hand, I am really encouraged. We are moving
16 forward with depositions of bellwether Plaintiffs. We
17 started taking some last week, took some more -- we are
18 in the process of taking more this week. We have at
19 least half of them with good firm notice dates and
20 scheduled up. And we are optimistic that we are going
21 to be able to get these done.

22 At the same time, part of our challenge is to
23 make sure that we have got the documents and the records
24 that we need to be able to accurately and fully depose
25 these bellwether Plaintiffs.

1 We don't want to have to come back to these
2 people and make them sit again for another deposition,
3 and yet at the same time we want to make sure we have
4 got all of the information. I appreciate Mr.
5 Zimmerman's position. It is a massive undertaking with
6 technical issues on both sides of the aisle on this
7 issue.

8 I think it might be useful, and I can go into
9 as much or as little detail as is useful for the Court
10 or anyone else here to discuss some of the problems we
11 are having with some of the bellwether Plaintiffs,
12 Plaintiff fact sheets and authorizations, which are
13 really emblematic of the same kinds of problems that we
14 have with the larger group of cases. Because obviously
15 we have to move forward quickly with these depositions,
16 they are more acute. There are some categories of
17 problems we have.

18 There are some bellwether cases where we
19 still don't have any authorizations.

20 THE HONORABLE JUDGE FRANK: Why is that, Mr.
21 Zimmerman, or whoever wants to be heard?

22 MS. FLEISHMAN: I can actually respond to
23 that, if I may.

24 THE HONORABLE JUDGE FRANK: Why is that?

25 MS. FLEISHMAN: I think that what we need to

1 -- I'm sorry, Wendy Fleishman, I apologize. I think
2 that we need to work with Mr. Carpenter and find out
3 exactly who the Plaintiffs are of the bellwether subset
4 that haven't supplied any authorization.

5 I suspect that -- my suspicion is, at least,
6 that the ones that there are no authorizations for are
7 the ones that the Plaintiffs were going to stipulate to
8 withdraw as Plaintiffs and withdraw their cases
9 entirely. And that that is really what the problem is.
10 And we just need to sit and talk about that and figure
11 that out, which is the same issue we raised in chambers
12 with regard to the authorizations and Plaintiff fact
13 sheets that are still missing with respect to certain
14 cases that were filed.

15 THE HONORABLE MAGISTRATE JUDGE BOYLAN: Do I
16 understand that you are going to be meeting and
17 conferring this afternoon, perhaps, on some bellwether
18 issues?

19 MS. FLEISHMAN: Tomorrow morning.

20 THE HONORABLE MAGISTRATE JUDGE BOYLAN: Oh,
21 tomorrow morning? And that might be one of the matters
22 you are taking up?

23 MS. FLEISHMAN: Yes. I don't mean to cut you
24 short, but we are also trying to meet and now get sort
25 of a daily schedule out. So, if there are problems such

1 as a specific plaintiff, I think Mr. Harkonen, and the
2 Plaintiffs -- or Defense were missing records for a
3 seven-month period. We are trying to address that and
4 get those records to them as quickly as possible, so
5 that these problems are not brought to the Court's
6 attention, and also won't stop the process whatsoever.

7 THE HONORABLE JUDGE FRANK: Should I be
8 surprised or should we be surprised, if I understood you
9 correctly, that with respect to the bellwether selection
10 process there are cases that have been targeted as
11 bellwether that may step off the MDL? I mean, it seems
12 a bit late in the process, for both parties, to have
13 that occurring.

14 MS. FLEISHMAN: The Plaintiffs, with respect
15 to the Plaintiffs' bellwether set of 20, I don't expect
16 that to happen. With respect to the selection that the
17 Defendants made out of the 20, I do expect that to
18 happen. Because I suspect that is also why the
19 Defendants picked those.

20 I mean, as Your Honor knows, this is a
21 preemptory strike process. And I think in any case that
22 we pulled out in advance of the deposition, for reasons
23 like authorizations, medical records or unavailability
24 of the Plaintiff willing to go forward and be available
25 for trial are all reasons that will count as one of our

1 preemptories or our strikes in the process.

2 THE HONORABLE JUDGE FRANK: Well, we can't
3 resolve it here, but it just is also -- that I
4 understand. I am a bit surprised that when a Plaintiff
5 would have the ability to get to trial in March of next
6 year, because that is what is going to happen, that they
7 would walk away with no assurance of when, if ever, they
8 are going to get the case somewhere else.

9 They are going to have to withdraw their case
10 entirely.

11 THE HONORABLE JUDGE FRANK: All right.

12 MS. FLEISHMAN: I don't think that this is --
13 I think that the issue is that if they file a lawsuit,
14 they have to be ready, willing and able to go forward
15 with the lawsuit as expeditiously as possible, because
16 that is what is provided for under the Federal Rules,
17 and we have every intention of doing that.

18 THE HONORABLE JUDGE FRANK: And again --
19 maybe it is just my chitter-chatter, and that is
20 probably all it is, but I actually think the criticism
21 of some MDL cases is the inverse. In other words, there
22 are plaintiffs standing at the door saying: Why not me?
23 And so to hear some people say: Why me? Well, I guess
24 that is what we have your committee for and we will do
25 the best we can.

1 MR. ZIMMERMAN: Because they are picked by
2 someone else. I mean, that's -- theoretically the
3 Defense --

4 THE HONORABLE JUDGE FRANK: But, they filed
5 the lawsuit. Well, we will get them resolved.

6 MS. FLEISHMAN: They filed the lawsuit. If
7 they are not ready to proceed with the lawsuit as
8 expeditiously as possible, that will indeed count as one
9 of our strikes.

10 THE HONORABLE JUDGE FRANK: Like we have all
11 said together, both in written orders, and when we have
12 had our discussions, and here in this courtroom and
13 other courtrooms here, in the end, I mean, we have to
14 make the call. Well, have the cases you have come up
15 with, are they representative? Because if they are not,
16 they are not going to do for everybody on either side
17 what we want them to do. Well, we are not there yet, so
18 we will see what they look like when we get there
19 shortly.

20 All right?

21 MS. FLEISHMAN: All right.

22 MR. CARPENTER: Your Honor, just adding to
23 what Ms. Fleishman said, that process has already
24 somewhat begun. We have already had the dismissal of
25 one of the bellwethers. The Defendants picked the

1 Robinson case, which was allegedly a death case, a
2 wrongful death case, and that has been voluntarily
3 dismissed with prejudice. We expect more to follow.

4 I agree with a lot of what Ms. Fleishman
5 said, I think some of the problems with authorizations,
6 some of problems with fact sheets may stem from certain
7 Plaintiffs who are probably not going to be willing to
8 continue their cases and will end up being strikes.
9 Although, not to blindside Ms. Fleishman, but one of
10 them is one of her cases from Liz Cabraser, the Furtado
11 case. We still don't have authorizations in that case
12 according to our last records.

13 THE HONORABLE JUDGE FRANK: Well, in
14 fairness, we can put some responsibility right up here.
15 I filed an order earlier in the week, or at the end of
16 last week on some parameters on the authorizations.

17 So, it may be that someone was waiting to
18 see, well, what is the Court going to say on the
19 execution of some of these? So, that may or may not be
20 part of it, but that order should have come out earlier
21 than it did, but it was last week, to fine-tune some of
22 that a bit. And it is up on the web if there are people
23 saying what on earth is the Judge talking about. It
24 went up last week, so -- all right?

25 MR. CARPENTER: Yeah, that is a very valid

1 point. That may be the cause of some of that, Your
2 Honor.

3 In addition, though, we have got some other
4 issues that are not explainable with that dynamic, such
5 as there's a large number of bellwether cases in which
6 they are still giving us only provider-specific limited
7 authorizations in direct contravention of this Court's
8 prior Order from, I think it was, May 19th. The Duron
9 case, Hunt, Larson, Webb, Williams, Schacher, Martin,
10 Addis, White, and all of those cases, we have nothing
11 but provider specifically limited authorization.

12 In other bellwether cases, for instance, the
13 Walston case the Plaintiffs have substituted their own
14 set of authorizations for the Court-approved versions.
15 We have got a set in that case approved by the New York
16 State Department of Health, which is not what this Court
17 approved and not what the parties negotiated.

18 In other bellwether cases, Your Honor, the
19 Plaintiffs simply refused to provide certain subsets of
20 the authorizations. Sometime their mental health
21 records, sometimes their mental health military records,
22 sometimes it is just a general objection to providing
23 any authorizations, quote, protected by State and
24 Federal law, the Pritzker law firm objects on those.
25 In cases like Brewster, Haberle, Lowry and Pepper, we

1 have counsel still declining to give the full set of
2 authorizations ordered by the Court and negotiated by
3 the parties. In other cases, some of the bellwether
4 cases have probably innocently incorrectly filled the
5 authorization forms out incorrectly to the point where
6 they are unusable and we can't get proper medical
7 records or other records from them, cases like Roberts,
8 Newman, Harkonen and Morneau, there is a problem with
9 the existing authorizations. Certain parts were filled
10 out wrong and we just can't get the records we need.

11 In a lot of these cases, also, Your Honors,
12 in addition to the authorizations issues, we have got
13 outstanding deficiencies, several of these cases we sent
14 deficiency letters as early as March and received no
15 response or amendment whatsoever from a lot of these
16 cases. Cases like Johnny Clark, Clasby, Curcio,
17 Douglas, Kaminski, Martin, Addis and White, we have all
18 got outstanding deficiency letters that we either have
19 to have a response on and we have gotten none for, or we
20 have gotten a very inadequate response.

21 Some of the Plaintiff fact sheets came in
22 very recently, within the last month or so, and we are
23 still reviewing those to see how complete they are.
24 Those cases include Fuller, Robert Smith and the Western
25 case.

1 I can say that in several of the cases,
2 though, we do have relatively complete Plaintiff fact
3 sheets and proper authorizations. Those cases include
4 Beranek, Bradshaw, Braund, Brennan, Brewer, Bultena,
5 Pearl Clark, Fanzini, Lindemann, Poje, Rooker and
6 Rebecca Smith. They are not perfect, Your Honors, but I
7 think in those cases, they are relatively complete
8 enough that we can proceed and take some meaningful
9 depositions in all of those.

10 THE HONORABLE MAGISTRATE JUDGE BOYLAN: You
11 are getting into a lot of detail about complaints on
12 medical authorizations. You are not asking us to do
13 anything about that this morning, you are just giving us
14 some information. Where does it go from here? You are
15 meeting and conferring in reference to trying to pare
16 down the list of bellwether cases. So, where is this
17 going to go?

18 MR. CARPENTER: Yeah, that is the question.
19 What do we do about it? We have been coordinating with
20 the Plaintiffs Steering Committee trying to get some of
21 these issues fixed. We appreciate the help they have
22 been able to give us on some of that. But, some of the
23 counsel, despite this Court's orders, the May 19th
24 Order, for instance, making it clear you can't
25 provider-specific limit the authorizations, some counsel

1 are just not complying.

2 We would like -- first of all, it helps to
3 put on the record who is complying and who is not
4 complying. We are not delaying the depositions,
5 obviously, although we are trying to back load later in
6 the month-long period the ones we lack medical records
7 for and prioritize the ones we are relatively complete
8 for, or more complete for.

9 THE HONORABLE MAGISTRATE JUDGE BOYLAN: These
10 are depositions of the 20 --

11 MR. CARPENTER: The bellwether cases.

12 THE HONORABLE MAGISTRATE JUDGE BOYLAN: Or
13 cases that the Plaintiffs identified?

14 MR. CARPENTER: Both, both.

15 THE HONORABLE MAGISTRATE JUDGE BOYLAN: And
16 your bellwether cases?

17 MR. CARPENTER: Yes, yes, the whole 40.

18 We'd propose, or we would ask that the
19 Plaintiffs Steering Committee meet with, reach out to
20 these counsel in each of these cases and get these
21 issues fixed within a week.

22 This dialogue has been ongoing for quite some
23 time. We realize a week isn't much time, but at the
24 same time, the depositions of bellwether Plaintiffs is
25 ongoing and we really need this information.

1 So, what we propose is the Steering Committee
2 reach ought to these individual counsel and try to get
3 these problems fixed, get proper authorizations, get the
4 deficiencies fixed within a week of this date so we can
5 continue and get meaningful depositions.

6 THE HONORABLE MAGISTRATE JUDGE BOYLAN: Are
7 you attempting to complete discovery of the medical
8 records with the, at least in your view, unsatisfactory
9 authorizations that you have in hand? I mean, you are
10 taking a look at the authorization -- maybe you are not
11 particularly happy with it, but you are going to obtain
12 as many records as you can, given the authorization you
13 have in hand?

14 MR. CARPENTER: Absolutely. We are not
15 sitting back and waiting for perfect authorizations, we
16 are moving to get everything we can with what we have.

17 THE HONORABLE MAGISTRATE JUDGE BOYLAN: All
18 right.

19 MS. FLEISHMAN: Might I just respond for a
20 second? One second. First is that we have asked
21 counsel to give us a list of the problems they are
22 encountering in this process, and specifically as even
23 last week. And they just raised three of the issues
24 last week, which we addressed specifically in the
25 interim and were able to solve.

1 And one, actually, they asked me to provide a
2 deposition for one of my clients, and I even provided
3 that. So, we are addressing all of these. And if they
4 would sit with us and spend a little bit of time with us
5 in going through each of these problems, which I expect
6 we will do tomorrow, then I think we can address all of
7 these as quickly as possible.

8 The second issue is that we have addressed a
9 lot of the authorization problems, and I think we even
10 brought the issue to the Court. There is an outstanding
11 stipulation before the Court, and with this particular
12 problem with the ten-year limitation highlighted for the
13 Court's decision.

14 THE HONORABLE JUDGE FRANK: I filed an order
15 last week, so I think I took --

16 MS. FLEISHMAN: I'm sorry. We have the
17 Order. And then we will get that out right away.

18 And then the third issue that was pointed out
19 was that when the Defendants took, I think it is, Mr.
20 Bradshaw's Deposition on the 16th, it is interesting,
21 because they never even used any of these medical
22 records.

23 All they used was the Plaintiffs fact sheet.
24 And as Mr. Carpenter pointed out to the Court, they have
25 all of the material. So, we do want to move the process

1 along, and I think we will be able to do that. But, we
2 just want to be forthright with the Court when we have
3 problems.

4 THE HONORABLE MAGISTRATE JUDGE BOYLAN:
5 Simply because they have got the medical records and
6 they choose not to depose the Plaintiff on the records
7 they have in hand is neither here nor there. The
8 Court's Order was very clear that the type of
9 authorization that the Court expects the Plaintiffs to
10 provide to the Defense is crystal clear, and it should
11 not be limited, except as authorized by the Court.

12 And if in fact at the end of the day there
13 are disagreements between Plaintiffs and Defendants
14 about which are the bellwether cases, if the
15 disagreement includes the complaint that some of the
16 bellwether cases that Plaintiffs are promoting have not
17 been forthright and compliant with the Court's Order
18 about medical authorizations, that is going to have to
19 be one of the things that the Court considers in
20 determining whether or not to allow that to be a
21 bellwether case or allow a different case to be a
22 bellwether case. So, I mean, there are some
23 consequences that flow from this that I think is really
24 important. I know you are working on this, but my
25 comments are to underscore the importance in complying

1 with the Court's Order and getting that squared away,
2 because I think we have been really good about trying to
3 set out a time frame.

4 It is realistic to get those bellwether cases
5 teed up, but it requires a lot of cooperation from both
6 sides that it be done. And if the cooperation is not
7 there, there will be some consequences, it seems to me,
8 from the failure to comply with the Court's Order and
9 cooperate.

10 MS. FLEISHMAN: And that is useful, because
11 then we can say that to counsel for the individual
12 Plaintiffs, which we will do. But, we just need
13 cooperation from the Defense, too, to tell us when they
14 are having a problem. Because I don't want to come into
15 the courtroom, Your Honors, the first time to hear about
16 26 problems when Mr. Carpenter has ready access on a
17 24-hour basis to me by blackberry, telephone and any
18 other method one can think of by use of modern
19 electronic communication.

20 THE HONORABLE MAGISTRATE JUDGE BOYLAN: Yeah,
21 and I understand you are going to be talking about it
22 today and tomorrow, too.

23 THE HONORABLE JUDGE FRANK: Well, and it's
24 particularly, just to echo a bit, most of -- two
25 observations. One is, most of the ground work for these

1 medical authorizations were reached after negotiation
2 and stipulation. And whether it was by Court decision,
3 with some of the minor modifications, there is nothing
4 alarming about these authorizations. I mean, if I
5 compare them to a typical case in the Federal or State
6 Court across the country, there is nothing unusual about
7 them, other than the numbers. But, that should not
8 effect individual Plaintiffs. Because I think, as Judge
9 Boylan said, there is a bit at stake here, so we are
10 going to stay on the timeline we have. But the
11 potential consequence -- especially when you negotiated
12 most of the terms. So --

13 MR. ZIMMERMAN: And we understand that
14 totally, Your Honor. And I know you appreciate, we are
15 dealing with counsel who are not here today who we have
16 to communicate with who have their ways of doing things
17 in their office that may be different than what is
18 standard or practiced in the Federal Courts here or in
19 other places, and we are working hard on it.

20 I think the only thing I would like to say
21 is, we are here to meet and confer on these issues and
22 discuss them. The laundry list, I think is, you know,
23 for effect saying, you know, gosh, we have got a lot of
24 work to do, the massive undertaking, the technical
25 challenges, the good faith, I think you hear all that.

1 And we are working very hard on this and we hear the
2 message of the Court very well.

3 THE HONORABLE JUDGE FRANK: And if there is
4 something we can do to move this along -- because I
5 don't think we have closed our doors. So, I mean, if
6 there is something we can do, rather than enable the
7 problems to continue, but to resolve them -- I mean, we
8 will do them, we are not saying we won't involve ourself
9 if need be.

10 MR. ZIMMERMAN: Right. But, we have a
11 slightly different problem because we don't have a
12 client who is paying our bill and doing it like a
13 corporate defendant. We have a lot of people out there
14 we have to communicate with and get them to do it the
15 way we want it to be done. And there is a little bit of
16 a struggle on that, but we are working hard on it.

17 THE HONORABLE JUDGE FRANK: All right.

18 MR. ZIMMERMAN: Representative trial process
19 update, Your Honor. I think we kind of conferred on
20 that and I think we covered it. I don't know if the
21 Court wants anything more. The more we talked about,
22 the more we find we have too much to talk about.

23 Motions to dismiss for failure to file
24 Plaintiff fact sheets, I believe argument is going to be
25 set -- or is that going to be today?

1 MR. CARPENTER: It was scheduled for today,
2 but I don't believe -- I'm sorry, Your Honors -- we have
3 officially entered the joint stipulated order. We are
4 prepared to argue that if it pleases the Court. I don't
5 know if Mr. Stout, or the only opposed motions counsel
6 is here. We can do it at a later date or we can do it
7 another day.

8 MR. ZIMMERMAN: The truth is I don't know the
9 status of Mr. Stout's --

10 MR. CARPENTER: Your Honors, we will point
11 out that 9 of the 10 are unopposed.

12 THE HONORABLE JUDGE FRANK: With respect
13 to -- it seems to me we can give notice that we are
14 going to hear it if there is opposition, take care of
15 the rest, and then give notice, okay, we will hear it
16 next time in the door. And if one of you say, well, we
17 would like to hear it before July 18th, otherwise we'll
18 just indicate today informally, we will hear any
19 opposition on that date and set it at the back end of
20 the agenda?

21 MR. ZIMMERMAN: Yeah.

22 MR. PRATT: I think nine of the ten are
23 unopposed.

24 THE HONORABLE JUDGE FRANK: They are.

25 MR. PRATT: We would ask that those be

1 entered if there is opposition, then we can set the
2 schedule to deal with that.

3 THE HONORABLE JUDGE FRANK: All right, that
4 is what we'll -- we'll set, assuming -- I think that is
5 the correct number. We will set it for July 18th at the
6 end of the agenda, unless there is some agreement
7 reached or we hear otherwise.

8 MR. ZIMMERMAN: And just so everybody
9 understands, we as a Plaintiffs Steering Committee
10 accept the notion that failure to comply with Plaintiff
11 fact sheets can be dealt with of dismissal of the case
12 for noncompliance.

13 On the other hand, we don't want anybody to
14 lose, have a case dismissed, for failure to understand
15 that they have to do something and be on notice that
16 they haven't done that which they are required to do.

17 We will take it -- we have taken it upon
18 ourselves as a Plaintiffs Steering Committee to reach
19 out, notify people, let them know of the potential
20 consequence. We think that on July 18th, with regard to
21 these nine people, if they aren't in compliance, we
22 understand those cases will be dismissed. We would ask
23 that that be moved to that July 18th date.

24 THE HONORABLE JUDGE FRANK: I think those
25 are -- there is no opposition now to those nine. It us

1 just the one --

2 MR. ZIMMERMAN: It is just the one that is
3 opposed, that is correct. If they haven't been opposed,
4 we are not trying to make an opposition where one
5 doesn't exist.

6 THE HONORABLE JUDGE FRANK: It should be
7 noted briefly that these are dismissals with prejudice,
8 not without.

9 MR. ZIMMERMAN: Sure.

10 THE HONORABLE JUDGE FRANK: And obviously,
11 the lawyers in the room know that there is more than a
12 small significance to that. They are with prejudice.
13 That is the way it has been set up and noticed. In any
14 event --

15 MR. ZIMMERMAN: And we understand that, as
16 well, and we have communicated that, as well.

17 That brings us then to the second group,
18 which is a joint proposed schedule for the hearing and
19 argument and briefing on that. We had provided in
20 Exhibit A, a schedule for the setting up of the next
21 round of those potential compliance or dismissals. And
22 it provides that Defendants -- that Plaintiffs' response
23 to Defendants' Motion to Dismiss shall be filed on or
24 before June 30, 2006. Defendant's replies by July 7,
25 2006, and then the Court will hear argument, it says, at

1 the next July status. You may want to move that to the
2 August status depending on the scheduling of the --

3 THE HONORABLE JUDGE FRANK: It will be fine.
4 We will set the -- July 18th, we will firm the date up,
5 but I think that will be fine.

6 MR. ZIMMERMAN: And as I sit here today, I
7 don't know how many are within that second group, but
8 Andy, I am sure you know off the top of your head.

9 MR. CARPENTER: Actually, there is just one.

10 MR. ZIMMERMAN: Just one. We are doing good
11 here, Judge, we are doing good.

12 Proposed joint stipulations, this has to do
13 with one very minor matter, which is B, which is a word
14 count. Apparently there is a stipulation to exceed the
15 number of words, is that correct?

16 THE HONORABLE JUDGE FRANK: That is fine.

17 THE HONORABLE MAGISTRATE JUDGE BOYLAN: Minor
18 in their opinion?

19 MR. ZIMMERMAN: Not so fast.

20 THE HONORABLE MAGISTRATE JUDGE BOYLAN: Minor
21 in whose opinion?

22 THE HONORABLE JUDGE FRANK: I've got to read
23 this --

24 MR. ZIMMERMAN: Somebody has to read this
25 crap.

1 THE HONORABLE JUDGE FRANK: We would never
2 characterize anything counsel is doing -- what was that
3 word you used again?

4 MR. ZIMMERMAN: These words of endearment and
5 enlightenment, these words, 12,000 words of
6 enlightenment. Apparently we were asking for more. And
7 the parties request leave from this word limit to file
8 briefs that -- do we have a word -- did we agree on a
9 word limit?

10 THE HONORABLE JUDGE FRANK: I did note.
11 Conspicuous by its absence, it is not how much more?

12 MR. ZIMMERMAN: I would say 22 words more.

13 Then the second issue, Your Honor, is the
14 response with regard to the Master Complaint.

15 We spent some time discussing this in
16 chambers. I think probably it would be helpful to maybe
17 go on the record and explain it very briefly, if you
18 would like. The Master Complaint does name Boston
19 Scientific.

20 The Complaints that were filed prior to the
21 merger, or the acquisition, or the whatever by Boston
22 Scientific of Guidant, Boston Scientific was not named
23 in those Complaints.

24 With regard to the Master Complaint, that we
25 have agreed by stipulation there would be -- which is

1 the stipulation contained in Exhibit B, is there would
2 be an answer -- how are we agreed? There would be an
3 answer -- not filing an answer, but you do not waive any
4 defenses. Is that correct?

5 MR. CARPENTER: That is right.

6 MR. ZIMMERMAN: And frankly, I don't know why
7 we would agree to that. Did we?

8 MR. LESSER: Paragraph C, it really works off
9 of paragraph C.

10 MR. PRATT: It is really not as complicated
11 as it sounds. The deal is, Boston Scientific has not
12 being added officially as a named Defendant in the
13 Master Complaint.

14 We have told the Plaintiffs Steering
15 Committee we will not agree to the addition of Boston
16 Scientific as a Defendant, because they have been named
17 as a Defendant but not added. The agreement is that we
18 don't need to respond on behalf of Boston Scientific by
19 the deadline of June 26th. They are not a party. We
20 don't need to respond.

21 Plaintiffs Steering Committee says they are
22 going to amend to add Boston Scientific as a Defendant.
23 That has not been done. When that is done, we will
24 respond appropriately and deal with it then.

25 THE HONORABLE MAGISTRATE JUDGE BOYLAN: I

1 assume the motion to amend to add Boston Scientific will
2 be done in a fairly timely fashion so we can tee this up
3 and get it resolved one way or the other?

4 MR. ZIMMERMAN: Yeah. And I think that is
5 why I was confused about the stipulation. I didn't
6 really understand the nuance. But, what is said is
7 accurate as Tim has just portrayed it. And then we will
8 move to add Boston Scientific as a Defendant to the
9 Master Amended Complaint, formally, and to the prior
10 Complaints. The Court will hear it. There will be
11 opposition. We will brief it and it will be resolved on
12 its merits.

13 THE HONORABLE MAGISTRATE JUDGE BOYLAN: Can
14 we do that at the same time the preemption motion is
15 considered?

16 MR. ZIMMERMAN: They are in it, but they are
17 saying they are not appropriately in it without an
18 amendment.

19 THE HONORABLE MAGISTRATE JUDGE BOYLAN: Well,
20 there has to be a motion to amend to add Boston.

21 MR. LESSER: Well, it would not be true for
22 some of our Plaintiffs whose first Complaint in this
23 litigation --

24 THE HONORABLE MAGISTRATE JUDGE BOYLAN: No,
25 but apparently there are a lot of Complaints out there

1 that didn't have Boston Scientific. There has got to be
2 a motion to amend Boston. All they are saying is that,
3 make the motion. We will look at it. If we want to
4 agree, we will. If we don't want to agree, we will put
5 in a response and the Court will decide it.

6 I guess my only question is, is there any
7 reason that it can't be considered at the same time as
8 that preemption motion since we already talked about
9 that kind of scheduling -- I mean --

10 MR. ZIMMERMAN: It probably makes sense, Your
11 Honor.

12 MR. LESSER: I don't see a reason why we
13 couldn't. I just want it to be very clear that Boston
14 Scientific is a named party in the Master Complaint.
15 And the agreement is that there need not be an answer at
16 the present time on behalf of Boston Scientific to their
17 inclusion as a party in the Master Complaint.

18 THE HONORABLE MAGISTRATE JUDGE BOYLAN: But,
19 I think that almost begs the question, because they are
20 named in the Master Complaint, but they are not a party
21 in some of the earlier complaints, so we have got to get
22 it kind of cleaned up.

23 MR. LESSER: That is what we are trying to
24 do. And we will try to work, I believe it is fair to
25 say, towards having it heard at the same time --

1 THE HONORABLE JUDGE FRANK: We can hear both.

2 MR. PRATT: We will work it out.

3 MR. ZIMMERMAN: We will work it out. Because
4 of the merger, it has created this disconnect. We will
5 clean it up. It is not completely cleaned up yet, but
6 at least there is a stipulation that they don't have to
7 answer the Master until it is cleaned up.

8 THE HONORABLE MAGISTRATE JUDGE BOYLAN: It is
9 a house cleaning matter, but it may be an important
10 matter for the Defense. We will wait and see whether or
11 not it is.

12 The scheduling of the next telephone
13 conference call?

14 THE HONORABLE JUDGE FRANK: July -- how about
15 July 5th?

16 THE HONORABLE MAGISTRATE JUDGE BOYLAN: It is
17 the day after the July 4th. Is that a date both of
18 you --

19 MR. ZIMMERMAN: At eight in the morning, Your
20 Honor? Come on.

21 THE HONORABLE MAGISTRATE JUDGE BOYLAN: We
22 can change that.

23 MR. ZIMMERMAN: How about July 6th? At
24 eight?

25 THE HONORABLE JUDGE FRANK: Well, I would

1 rather have eight, because I think I will be in trial
2 that week, so if it is at eight, it's not --

3 MR. ZIMMERMAN: There is just a lot of people
4 travelling --

5 THE HONORABLE MAGISTRATE JUDGE BOYLAN: Are
6 you going to be in court the day after the 4th of July?

7 THE HONORABLE JUDGE FRANK: Well, no -- well,
8 yes. But, eight, either day, we will make work.

9 (Discussion off the record.)

10 THE HONORABLE JUDGE FRANK: The Defense side
11 of things, Plaintiffs' side of things? July 6th at 8:00
12 a.m.?

13 THE HONORABLE MAGISTRATE JUDGE BOYLAN: Let
14 me ask this, in reference to this two-week conference,
15 is there anything on anybody's radar screen? Do you
16 think we are going to need a conference in two weeks? I
17 mean, this could be the middle of summer, July 4th
18 weekend, where everybody says, hey, guess what, Judge,
19 we don't have to see you until July 18th, because there
20 is nothing burning that we need to talk to you about.
21 I mean, there is always that possibility, isn't there?

22 MR. ZIMMERMAN: Always, hope breeds eternal.

23 MR. LESSER: Hopefully, we would let you know
24 in advance, I do think there are some things that might
25 be boiling up that we don't manage in our meet and

1 confer. And even if it only takes 10 or 15 minutes, it
2 is worthwhile to have it.

3 THE HONORABLE MAGISTRATE JUDGE BOYLAN: All
4 right.

5 MR. ZIMMERMAN: So, the schedule, then, as I
6 understand it is July 6th at 8:00 a.m., the call in; and
7 July 18th.

8 THE HONORABLE JUDGE FRANK: Which for
9 everybody is a Tuesday, not a Wednesday, because of
10 mostly Judge Boylan's and my schedule. Tuesday, here in
11 Minneapolis, July 18th. The same regimen, 8:00 for the
12 meeting with counsel, 9:15 -- the difference, we are
13 going to tee up these -- make sure we have got the
14 motion, the opposition to any motion to dismiss. And if
15 we don't have any other -- any other issues resolved and
16 something is ready to be argued, because these motions
17 now are coming in with responses, we can see where we
18 are at with that, well in advance of the hearing, and
19 say we will hear that at the same time, as well.

20 MR. ZIMMERMAN: That is fine, Your Honor.
21 And the only other date that we sort of set is this
22 hearing on the preemption, which we will reach later.

23 THE HONORABLE JUDGE FRANK: We will figure
24 that out. I think the main issue there is I can
25 accommodate almost any time, as long as there is enough

1 time in between for us to prep for the hearing. The
2 real issue I think for respective counsel is, do you
3 want it on the same day as the status conference
4 following the briefing, or do you want it on a separate
5 date, because we can probably make either work, so --

6 MR. ZIMMERMAN: And we will talk that out and
7 call in on making that --

8 MR. LESSER: In that regard, Your Honor, if
9 it ended up being, for instance, the same day as the
10 status conference, the next status conference at 9:15
11 would probably be the following week. And I guess we
12 would probably want to know whether a week's time with
13 the papers would be enough for the Court.

14 THE HONORABLE JUDGE FRANK: Well, we have --
15 that is a push.

16 MR. LESSER: That is why I asked.

17 THE HONORABLE JUDGE FRANK: Because that,
18 ordinarily, would be a push. And I think it is safe to
19 assume it would be here, because that would probably --
20 yes, it would be.

21 MR. LESSER: That is how it would fall.

22 THE HONORABLE JUDGE FRANK: So, then the real
23 issue would be to go into either October or an earlier
24 date prior to that. Yeah, I think we should just assume
25 that the next status conference with a week downtime is

1 not going to do it.

2 MR. LESSER: That is why I asked.

3 THE HONORABLE JUDGE FRANK: So, we will do
4 it sometime early October?

5 THE HONORABLE MAGISTRATE JUDGE BOYLAN: I
6 mean, if the briefing is done on the 15th, there is no
7 way that that is going to be ready for a hearing on the
8 following Wednesday. The 20th, by the way, Wednesday?

9 MR. LESSER: Yes.

10 THE HONORABLE JUDGE FRANK: So then the issue
11 would be October.

12 MR. ZIMMERMAN: Do you want to set a date
13 now?

14 THE HONORABLE JUDGE FRANK: Then the issue
15 is, if you want to have it on the date -- in the October
16 date, or unless you want it earlier, that October day
17 would be Wednesday the 18th.

18 MR. ZIMMERMAN: Why don't you just set a date
19 early in October for the motion to amend, but primarily
20 the preemption, and not mix it up with the status. It
21 will get everyone -- you know, we have enough issues
22 with those two, I think, to come before the Court.

23 THE HONORABLE MAGISTRATE JUDGE BOYLAN: And
24 actually, that is not going to be before me, it will
25 just be before Judge Frank. So, there is no reason for

1 two of us to be here, so I agree with that assessment.

2 It makes sense to have Mr. Lindquist give you a date.

3 THE HONORABLE JUDGE FRANK: He will give you
4 a date. We will get a date sometime in early to
5 mid-October, prior to the 18th.

6 MR. PRATT: Yes, I would -- I would suggest
7 closer to the middle than the early part. I mean, I
8 have got the Texas trial set for the middle of
9 September, so I may be captive until the middle of
10 October.

11 MR. ZIMMERMAN: I have a wedding I have to
12 attend on October 8th.

13 THE HONORABLE JUDGE FRANK: So, are you -- is
14 Mr. Pratt making any -- are you making predictions on
15 the trial proceeding as scheduled in October?

16 MR. PRATT: If it involves Texas, Your Honor,
17 I make no predictions.

18 THE HONORABLE JUDGE FRANK: Okay, I will
19 first start with lead counsel and go to any lawyers in
20 the audience. Anything further on behalf of Plaintiffs?

21 MR. ZIMMERMAN: Not from Lead Counsel, Your
22 Honor. Thank you.

23 THE HONORABLE JUDGE FRANK: Mr. Pratt and
24 co-counsel?

25 MR. PRATT: Nothing, Your Honor.

1 THE HONORABLE JUDGE FRANK: Is there any
2 respective counsel in the audience, regardless in what
3 capacity you are here on -- unless you are here for the
4 criminal cases this afternoon, I am not going to hear
5 you out now during the Guidant matter, but anybody have
6 anything further at this time? We will try to keep
7 everything on the web. I think everything is
8 essentially on schedule.

9 Since it is now clear that we will set up a
10 date somewhere in the area of mid-October for the
11 presumption argument, and more than likely put on the
12 motion to amend, unless it is resolved, I will be
13 hearing -- I will hear those together, if need be. As
14 soon as that date is set, which will probably be soon,
15 if not today, the next couple of days once counsel look
16 at their schedules, we will get a date and we will get
17 that up on the website. Because it looks like it will
18 not be on the third Wednesday in October. Maybe that is
19 the prudent thing to do.

20 Unless there is anything further, I will
21 thank everybody for their attendance. And I think we
22 might have a couple sidebars here with a couple of the
23 Plaintiffs' lawyers. But, other than that, we are
24 adjourned and thank you very much.

25 THE HONORABLE MAGISTRATE JUDGE BOYLAN: The

1 sidebars have nothing to do with Guidant.

2 (Adjournment.)

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7 Certified by: _____

8 Jeanne M. Anderson, RMR-RPR
9 Official Court Reporter
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